

case the [final judgment] rule prohibits appellate review until conviction and imposition of sentence” (*Vela*, p 1159). Judge Smith noted that Mr. Vela’s case did not end in conviction but in an acquittal and no sentence, and thus the judge opined that he had no legal standing to appeal the verdict, because he won his case through a defense that he himself chose.

Judge Smith stated that the majority’s decision to hear Mr. Vela’s appeal set a dangerous precedent. He pointed out that when the defendant’s pretrial motions were denied, which rendered him unable to enter a diminished-capacity defense, he had two options: to plead not guilty, and if convicted, appeal on the issue of the denial of his motions, or to change his plea to NGRI, knowing that if he succeeded in getting an acquittal, he would not be able to appeal. Mr. Vela chose to plead NGRI; however, after he was acquitted, instead of accepting the loss of ability to appeal inherent in his chosen strategy, he appealed his verdict. By agreeing to hear his appeal, Judge Smith believed that the majority allowed him to take advantage of the legal system, and wrote, “Now Vela wants to have his cake and eat it too by appealing one failed affirmative defense, while keeping his acquittal verdict as a back up. We ought not act as a guarantor against defendant’s strategic trial decisions” (*Vela*, p 1160).

Discussion

The legal system ideally serves to punish individuals if they are culpable for their crimes. Crimes therefore require two elements: the *actus reus*, or forbidden act, and *mens rea*, or guilty mind. The prosecution must prove both elements.

Statutory definitions of crimes include not only what specific act constitutes the crime, but also what level of *mens rea* must have been present. Some crimes are defined as general-intent crimes, for which intentional commission of an act must be proved. Thus, if a prosecutor can show that a defendant committed an act intentionally, with knowledge that his act would lead to harm, he has proven the *mens rea* for a general-intent crime.

Specific-intent crimes, carry a higher level of *mens rea*. For such a crime, the prosecutor must prove that the defendant knowingly or purposefully committed an act, requiring a higher degree of understanding of the circumstances of the crime and the consequences of his actions. If an individual charged with a specific-intent crime had a condition such as psychosis that

interfered with the ability to interpret the reality of the circumstances surrounding the offense, that factor can be relevant to the defense. The defendant can raise a diminished-capacity defense. Through this defense, the defendant seeks to prove that his mental state at the time of the crime prevented formation of the requisite *mens rea*. If the trier-of-fact concurs, the defendant is usually found guilty of a lesser included offense and, occasionally, is acquitted outright.

In *United States. v. Vela*, a psychotic criminal defendant had two legal strategies in mind at the outset of his trial: a diminished-capacity defense, which, if successful, would result in an unconditional acquittal of any charge requiring specific intent, or a plea of NGRI, which, if successful, would result in an acquittal that carried consequences. When one considers the consequences of a successful NGRI, including loss of liberty through civil commitment and the stigma of having been found legally insane, it is easy to understand why Mr. Vela fought to have his crime defined as a specific-intent crime and to be allowed to enter a diminished-capacity defense. The court’s findings about general-intent crimes flow logically in this case by statutory definition. It is noteworthy that the court allowed his appeal to be heard after a finding of NGRI, despite that being his stated plea. However, the groundwork had been laid in advance that he preferred to plead diminished capacity.

Exclusion of Expert Psychiatric Testimony

Jennifer Piel, JD, MD
Fellow in Forensic Psychiatry

Phillip J. Resnick, MD
Professor of Psychiatry
Director of Forensic Psychiatry

Department of Psychiatry
University Hospital of Cleveland Case Medical Center
Case Western Reserve University
Cleveland, OH

No Error in Barring Expert Testimony on Asperger’s Disorder When Defendant Did Not Assert a Mental Illness Defense

In *State v. Anderson*, 789 N.W.2d 227 (Minn. 2010), the Minnesota Supreme Court held that it was not an abuse of discretion to bar a defendant in

his murder case from presenting expert testimony regarding Asperger's disorder. The defendant did not assert a mental illness defense, and, because it was not relevant, the trial court's exclusion of expert psychiatric testimony at trial did not violate the defendant's rights.

Facts of the Case

In October 2007, police officers in Savage, Minnesota, received a phone call that a discarded purse, belonging to Ms. Katherine Olson, had been found. Police contacted Ms. Olson's roommate, who reported that Ms. Olson had traveled to Savage in response to an online advertisement for a babysitting job. A few days later, police located Ms. Olson's car and found her body in the trunk. Ms. Olson's autopsy indicated that she died of a gunshot wound; the manner of death was homicide.

The police reviewed Ms. Olson's e-mail inbox and learned that she had responded to an advertisement from "Amy" requesting a babysitter. Ms. Olson's phone records revealed that her last call was to a Michael Anderson. The police investigation revealed that he had made numerous online postings for female models, sexual encounters, and babysitters and had posed as "Amy" in several emails regarding a request for babysitting services.

The police took custody of Mr. Anderson on the basis of a missing-person investigation. He was read his *Miranda* rights, and he admitted that he made online postings, admitted that he was present when Ms. Olson was killed, and stated that a friend of his "thought it would be funny" to kill Ms. Olson. Extensive forensic DNA and ballistics evidence tied him to the crime. A grand jury indicted him for first-degree premeditated murder and second-degree intentional murder.

Initially, Mr. Anderson pleaded not guilty by reason of mental illness. Two defense experts diagnosed Asperger's disorder. Two court-ordered experts concluded that he did not have Asperger's and was not mentally ill. He withdrew his mental illness defense and entered a plea of not guilty. At trial, he argued that expert psychiatric testimony should be permitted, to demonstrate how Asperger's affected his cognitive and physical capacities. The trial court denied the motion to admit expert testimony. The jury found him guilty of all charges, and he was sentenced to life in prison without possibility of release. He appealed to the Minnesota Supreme Court.

Ruling

In a unanimous decision, the Minnesota Supreme Court held that the trial court did not abuse its discretion or deny Mr. Anderson a fair trial by excluding expert psychiatric testimony about Asperger's, because he did not assert a mental illness defense. Minnesota does not recognize the doctrine of diminished capacity, and no exception to excluding expert testimony applied in this case.

Reasoning

Mr. Anderson raised three issues related to the exclusion of expert psychiatric testimony in his case. First, he asserted that testimony on Asperger's was necessary to explain his physical appearance, mannerisms, and lack of empathy. Because there was no evidence to explain his appearance and behavior, he argued, he was prevented from testifying and was thus deprived of a fair trial. The trial court's exclusion of expert testimony is reviewed for abuse of discretion.

The court acknowledged that Mr. Anderson had a constitutional right to present a meaningful defense, but added that the right is not unlimited. A trial court may exclude expert testimony when the court determines that the evidence would not be helpful to the jury or when the probative value is outweighed by the danger of unfair prejudice or confusion. The court relied on evidence from the trial court that there was nothing particularly unusual about Mr. Anderson's physical appearance or mannerisms at trial. Based on the trial court's observations and risk of confusing the jury, the court concluded that the trial court did not abuse its discretion in excluding the expert testimony.

Second, Mr. Anderson alleged that expert testimony on Asperger's was necessary to negate the *mens rea* for murder. He argued that, absent psychiatric testimony, the jury would presume that his brain functioned and premeditated normally. In responding to this assertion, the Minnesota Supreme Court relied on two cases as precedent: *State v. Provost*, 490 N.W.2d 93 (Minn. 1992), and *State v. Brom*, 463 N.W.2d 758 (Minn. 1990). Minnesota does not recognize the doctrine of diminished capacity.

In *Provost*, the court held that psychiatric opinion testimony was not admissible on whether a defendant had the capacity to form the requisite subjective

state of mind. Nor was it admissible on the ultimate question of whether a defendant had the requisite *mens rea* when he committed the crime. In *Brom*, the court considered a slightly different issue, whether a defendant could present expert evidence on premeditation (rather than intent). The court concluded that there was no meaningful distinction between intent and premeditation for the purpose of admitting psychiatric testimony and prohibited both in the guilt phase of the trial.

In applying the holdings in *Provost* and *Brom*, the court concluded that exclusion of psychiatric expert testimony did not violate Mr. Anderson's right to a fair trial. Because Minnesota does not recognize diminished capacity, the jury could only find Mr. Anderson legally sane or insane; accordingly, mental capacity testimony was irrelevant.

Third, Mr. Anderson argued that his situation fell within a recognized exception to exclusion of psychiatric testimony. In *Provost*, the court stated that expert testimony may be allowed in rare cases in which a mental disorder, characterized by the formation of a particular subjective state of mind, is inconsistent with the particular *mens rea*, or the defendant has a history of mental illness and testimony is needed to explain the "whole man" before the crime. Here, the court stated that Mr. Anderson failed to show how Asperger's prevents a person from premeditating or forming intent; thus the first exception did not apply. The court similarly rejected his claim based on a history of mental illness because he had no documented history of mental illness before his crime. In fact, the question of Asperger's never arose before it was suggested by defense-employed experts.

The Minnesota Supreme Court affirmed Mr. Anderson's conviction and sentencing.

Discussion

The central issue in this case is the extent to which psychiatric testimony can be presented when a defendant elects no mental illness defense. This question is not new to the courts, and states have taken different approaches to it. According to Dr. Paul Appelbaum (*Psychiatr Serv* 57:1370–2, 2006), 37 states allow testimony regarding mental disorders to rebut *mens rea*; 13 states exclude evidence related to the impact of a defendant's mental disorder on *mens rea*.

The U.S. Supreme Court considered the issue in *Clark v. Arizona*, 548 U.S. 735 (2006). Eric Clark was charged with murdering Police Officer Jeffrey Moritz in Flagstaff, Arizona. His diagnosis of paranoid schizophrenia was not disputed at trial. He pleaded guilty but insane and also planned to show that his schizophrenia precluded him from forming the requisite intent to murder. However, the trial court barred him from presenting mental illness testimony to rebut the requisite *mens rea* for the crime.

On appeal, the U.S. Supreme Court in *Clark* upheld an Arizona law that a criminal defendant could not present evidence of his mental illness to negate *mens rea*. The Court stated that "observational" evidence (direct observations about the defendant's behavior and statements) is permitted to rebut *mens rea*, but not "mental disease" (expert opinion on mental illness) or "capacity" (capacity for cognition and moral judgment) evidence. The Court held that it was constitutional for states to limit evidence of mental disease solely to questions of insanity and that Arizona's effort to bar diminished capacity as a defense was constitutional.

In *Anderson*, the court relied on precedent from *Provost*. In *Provost*, the court explained that a defendant's capacity for forming criminal intent is determined from what a defendant says and does: the "physical evidence" of the defendant's actions and demeanor. Similar to the *Clark* Court's use of observational evidence, this "physical evidence" is "lay evidence" that is admitted in any criminal case and allows the trier-of-fact to make a decision without the need for expert testimony.

This case also outlined Minnesota's exceptions to excluding expert psychiatric testimony as articulated by *Provost*. One of the exceptions is when a defendant has a history of mental illness and testimony about the illness would describe "the whole man" before the crime. In *Anderson*, the court relied on the fact that Mr. Anderson had no prior mental health records. Of interest, the court did not discuss the fact that Asperger's is a pervasive disorder that, by nature of the diagnosis, he would have had before the crime. It is not uncommon for forensic evaluators to see persons in the legal system who have never had a diagnosis of mental illness, but meet the criteria for a Diagnostic and Statistical Manual of Mental Disorder diagnosis. In this case, the court appeared to apply the exception narrowly.